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No. 79-1212

In the Supreme Court of the United States

OCTOBER TERM, 1979

JEROME WEINKLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that, in spite of his receipt of immunity, he was entitled to invoke his Fifth Amendment privilege against compulsory self-incrimination before the grand jury.

1. Since 1977, a federal grand jury in the Southern District of Ohio has been investigating certain transactions engaged in by petitioner and several of his corporations. On April 26, 1979, petitioner was granted immunity, pursuant to 18 U.S.C. 6002, in exchange for his testimony before the grand jury (Pet. 6-7). The next day, he appeared before the grand jury, where he testified concerning the circumstances surrounding a loan made by a union to one of his corporations (Pet. App. 3). When questioned about certain checks subsequently drawn on

the corporation's account, however, petitioner declined to testify (*ibid.*). Petitioner later explained that he had refused to testify because he had become unfamiliar with the corporation's books and records during the period between the transaction in question and his grand jury appearance. Accordingly, the district court granted petitioner two weeks in which to familiarize himself with the records and prepare to complete his grand jury testimony (Pet. App. 4).

Petitioner was subsequently recalled before the grand jury and again asked about the checks. Again petitioner refused to testify about the checks, this time invoking his Fifth Amendment privilege against compulsory self-incrimination (Pet. App. 4). The district court then ordered petitioner to answer the questions or face a citation for contempt. Petitioner again refused to answer the questions, and the district court held him in civil contempt. The court committed him to the custody of the United States Marshal for the duration of the grand jury's term or until he purged himself of the contempt (Pet. App. 4-5). The court stayed its order pending petitioner's appeal to the court of appeals (Pet. App. 5).

2. The court of appeals affirmed (Pet. App. 1-2). The court noted that petitioner did not contend that a truthful answer to the questions he was asked would place him in jeopardy of a perjury prosecution because of any discrepancy between those answers and previous answers he had given to the grand jury. Rather, his contention was that the prosecutor had expressed an opinion that petitioner's anticipated answer to the questions – that he did not recall the purpose of the transactions in question—was untruthful, and accordingly that those questions were being asked in order to establish the basis for a perjury or false statement prosecution. This claim, the court held, did not entitle petitioner to decline to answer the questions (Pet. App. 2).

3. Petitioner contends (Pet. 14-15) that in spite of the grant of immunity, he is entitled to refuse to testify on the ground that the prosecutor has expressed his belief that the answers petitioner would give to questions at issue would be false. As the court of appeals correctly held, that is not a valid basis for invoking the privilege against compulsory self-incrimination.

Petitioner's contention, in essence, is that he should be excused from testifying before the grand jury because, even if he testifies truthfully, the United States Attorney's Office may prosecute him for perjury. This Court has firmly rejected any such contention, most recently in *United States* v. *Apfelbaum*, No. 78-972 (March 3, 1980). There the Court reiterated the well-settled principle that the federal immunity statute displaces the Fifth Amendment privilege, even though it permits a prosecution for perjury committed under the grant of immunity. Slip op. 11-12. Accordingly, the Court held, an immunized witness has no right to invoke the Fifth Amendment on the ground that he may commit perjury in the course of his testimony. *Id.* at 15.

Likewise, a witness who has been granted immunity has no right to refuse to testify on the ground that the government may seek to charge him with perjury on the basis of testimony that is in fact truthful. Any witness who testifies under a grant of immunity runs the risk of a perjury prosecution—whether justified or unjustified. Yet that risk is not one against which the Fifth Amendment affords protection. To be sure, by testifying petitioner will expose himself to a possible perjury prosecution and will thus be in a different position from that he would be in if he remained silent. But, as this Court noted in *Apfelbaum* (slip op. 11):

> It is * * * analytically incorrect to equate the benefits of remaining silent as a result of the invocation of the Fifth Amendment privilege with the protections conferred by the privilege—protections that may be invoked with respect to matters that pose substantial and real hazards of subjecting a witness to criminal liability at the time he asserts the privilege. For a grant of immunity to provide protection "coextensive" with that of the Fifth Amendment, it need not treat the witness as if he had remained silent.

If petitioner's position were sustained, it would largely destroy the value of the federal immunity statute. Any immunized witness who chose not to testify could assert his privilege on the ground that he might unjustifiably be prosecuted for perjury even if his testimony were truthful. If that claim were sufficient to justify the invocation of the privilege, the immunity statute would have no force until and unless Congress amended the statute to preclude prosecutions for perjury committed under the grant of immunity. And that, this Court has repeatedly held, is not constitutionally required. See *United States* v. *Apfelbaum*, *supra*, slip op. 11; *United States* v. *Wong*, 431 U.S. 174 (1977); *United States* v. *Mandujano*, 425 U.S. 564 (1976) (plurality opinion); *id.* at 584-585 (Brennan, J., concurring); *id.* at 609 (Stewart and Blackmun, JJ., concurring); *Glickstein* v. *United States*, 222 U.S. 139, 142 (1911).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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